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MEMORANDUM OF LAW

DATE: May 5, 2000

TO: Public Safety and Neighborhood Services Committee

FROM: City Attorney

SUBJECT: Proposal to Ban the Consumption of Alcohol in Public View

QUESTION PRESENTED

May the City enact an ordinance which bans the consumption of alcoholic beverages on both public and private property when the consumption takes place in the public view?

SHORT ANSWER

The City has broad authority to ban the consumption of alcohol in public areas. However, an ordinance which prohibits the consumption of alcohol on private property would restrict an owner's use and enjoyment of his or her private property. Therefore, before such an ordinance may be enacted, the City must make a fact-based finding that the consumption of alcoholic beverages on private property creates a nuisance and prevents adjoining property owners from enjoying the full benefits and use of their property.

INTRODUCTION

In 1903, the City enacted an ordinance prohibiting intoxication in or on private premises. That ordinance was repealed in 1977, because it conflicted with state laws regulating intoxication. Since that time, no ordinances restricting the use of alcohol on private property have been proposed or adopted by the City Council. You have asked whether the City could restrict consumption of alcohol on private property if the consumption takes place in public view. This memorandum addresses the issue of whether and how the City may enact such a ban.

ANALYSIS

I. State Regulatory Authority Regarding Alcoholic Beverages

The California Constitution states "[t]he State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State . . . ." Cal. Const. art. XX, § 22. This section has been interpreted by the courts to mean the state has preempted the regulation of alcohol only in the specifically enumerated areas. *See People v. Brewer*, 235 Cal. App. 3d 909 (1991); *People v. Butler*, 252 Cal. App. 2d Supp. 1053 (1967). The court in *Butler* relied on its finding "that regulation of consumption of alcoholic beverages as distinguished from possession, transportation, etc., was, almost studiously omitted, it seems, in article XX, section 22 of the Constitution." *Butler*, 252 Cal. App. 2d at 1057. Based on its finding, the court went on to say "there is nothing in the state law which indicates an intention to fully occupy the field relating to the consumption of alcoholic beverages in other than licensed premises, and the general rule permitting additional supplementary local regulation is, therefore, applicable." *Id*. at 1057. The decision allows cities to regulate the consumption of alcoholic beverages without running afoul of state law so long as the regulation does not infringe on those areas already controlled by the state.

The City has exercised its authority in this area and has enacted supplementary regulations which restrict the consumption of alcohol in public places. San Diego Municipal Code [SDMC] section 56.54 contains a broad ban which prohibits the consumption of alcohol on all public rights-of-way, including but not limited to, public streets, parking lots, sidewalks, alleys, plazas, piers and seawalls. The ordinance also restricts the consumption of alcoholic beverages in specifically named beaches and parks. This ordinance was passed after findings by the Council that the consumption of alcoholic beverages in the restricted areas could result in harm to the public safety, health, and welfare. A similar finding must be made before the City may restrict the consumption of alcohol on private property, but the finding must be specific as to the harm to the public created by consumption on private property.

II. Due Process Requirements

The City has broad authority under its police powers to pass general regulations to prevent harm to the public. "Police power is the power inherent in a government to enact laws, within constitutional limits, to protect the order, safety, health, morals and general welfare of society." *In re Ramirez*, 193 Cal. 633, 649-50(1924). However, the City's police power is not without limits and when a proposed regulation infringes on an individual's use and enjoyment of his or her private property, the protection of the individual's due process rights becomes a primary issue. Both the state and federal constitutions provide that no person may be deprived of life, liberty or property without due process of law. *See* U.S. Const. amend. XIV; Cal. Const. art. I, § 7.

Due process mandates that individuals whose rights may be affected by a proposed restriction on the use of their property have notice and an opportunity to be heard before the restriction may be finally imposed. *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 188 (1962). The notice must be specific enough to enable a person of ordinary intelligence to know precisely what conduct is prohibited and must set forth some norm and standard by which people will know their rights and obligations under the ordinance. *Id.* at 188. An ordinance that is so vague a person of ordinary intelligence cannot understand its meaning will be found by the courts to be void for vagueness. *Id.* Finally, the action must bear a reasonable and substantial relation to the object sought to be attained. *Id.* at 186. To aid cities in determining what actions may be considered reasonable, the courts have said the action or limitation must be rationally related to and justified by a public necessity. *Id*. We are concerned here only with whether the proposed restriction is justified by a public necessity, and whether the restriction bears a reasonable and substantial relationship to the ends it seeks to achieve.

III. Restrictions on the use and enjoyment of private property

The constitutional guarantee of the right of individuals to own property has a long history of protection by the courts. Courts have been wary of restrictions which severely hamper an owner's unrestricted use of his or her property. It is well-established that every person has a right to use his or her property in his or her their own way for his or her their own purpose, subject, only, to the restraints necessary to secure the common welfare. *Haller Sign Works v. Physical Culture Training School*, 94 N.E. 920, 922 (1911). The legislature may not, under the guise of its police power, impose restrictions that are unnecessary and unreasonable upon the use of private property. *Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). When a reasonable necessity for any proposed restriction cannot be articulated, the courts have said that the ordinance "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912).

Nevertheless, while property owners' rights regarding the use of their property are broad and well-protected, cities are granted equally broad police powers to enact ordinances to ensure the public good. "[T]he police power extends to everything expedient for the preservation of the public safety, health, comfort or good morals." *In re Weisberg*, 215 Cal. 624, 627 (1932). The courts have said "[i]t is within the legislative discretion in the exercise of such power to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort or health." *Id.* at 627-28. The competing rights of the property owner and the public must be carefully weighed before restrictions on the use of private property may be imposed. The courts have set forth a two-part test to determine whether a particular restriction on the use of private property constitutes a proper exercise of a city's police power. First, the City must determine "whether the object of the ordinance is one for which the police power may be properly invoked . . . ." *Thain*, 207 Cal. App. 2d at 186. If it is, the City

must then determine "whether the ordinance bears a reasonable and substantial relationship to the object sought to be attained." *Id.* at 186. If the answer to both questions is yes, the City may make a finding that consumption of alcohol on private property creates a nuisance, then exercise its police powers to impose reasonable means to abate the nuisance even if the necessary means entail a restriction on the use of private property.

The City has previously exercised its police power to regulate a number of activities deemed by the Council to be harmful to the public. These ordinances include restrictions on the use of private property. For example, SDMC § 33.3300 regulates peep show establishments and SDMC § 33.3901 regulates card rooms. The City has also exercised its police power to regulate behavior on public property; for example, SDMC § 52.5001 regulates cruising activity and SDMC § 52.4001 regulates aggressive solicitation. In adopting these ordinances, the Council followed the steps set out in the two-part test defined by the courts. Specifically, Council first determined what the harm to be prevented was and then determined whether the method chosen to restrict the activity bore a reasonable and substantial relationship to the harm being addressed. Having answered "yes" to those questions, Council adopted the ordinances. These same steps must be followed before a restriction banning the consumption of alcohol on private property may be adopted by Council.

A. The Doctrine of Nuisance

Cities are granted the authority to make determinations regarding public nuisances generally through the exercise of its police power and specifically by Government Code section 38771. The statute says that "[b]y ordinance the city legislative body may declare what constitutes a nuisance." Statutory definitions of nuisance assist cities in making this determination. Nuisance is defined as "[a]nything which is injurious to health, or is indecent, or is offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Cal. Civ. Code § 3479. *See also* Cal. Penal Code § 370. Civil Code section 3480, and Penal Code section 370 add to the definition of nuisance the caveat that interference with the enjoyment of property must affect "an entire community or neighborhood," or "any considerable number of persons."

Cities are not limited to the statutory definitions in all instances. In *People v. Johnson*, 129 Cal. App. 2d 1, 6 (1954) the court said, "A city has the power to pass general police regulations to prevent nuisances, and such power is not limited to the suppression of those things which are nuisances *per se* within the meaning of section 370 of the Penal Code and sections 3479 and 3480 of the Civil Code." *See City of Bakersfield v. Miller*, 64 Cal. 2d 93 (1966). A public nuisance may be summarized as "an act or omission which interferes with the interests of the community or the comfort or convenience of the general public and includes interference with the public health, comfort, and convenience." *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116,

123 (1971). In its simplest terms, a public nuisance is "an unreasonable interference with a right common to the general public." *Restatement, Second, Torts* § 821 B(1).

B. Application of the Doctrine of Nuisance to the Consumption of Alcohol on Private Property in Public View

In order for the City to declare drinking on private property in public view a public nuisance, it must identify the harm to the public. The harm generally associated with the consumption of alcoholic beverages is the offensive behavior that may occur when an individual has consumed too much alcohol. Both California and the City have previously enacted legislation intended to curtail many of the behaviors which are considered offensive or troublesome and are, therefore, a nuisance to the public. For example, state legislation prohibiting offensive behavior includes Penal Code section 647(f), which prohibits being drunk in public. For purposes of this statute, the courts have said "public" includes driveways, lawns, and front porches. *See People v. Olson,* 18 Cal. App. 3d 592, 598 (1971). Other sections prohibit soliciting or engaging in lewd or dissolute conduct in any public place, or in any place open to the public, or in any place open to the public or exposed to public view, Penal Code section 647(a); fighting in public, Penal Code section 415(1); disturbing the peace by loud and unreasonable noise, Penal Code section 415(2); and using offensive words in public, Penal Code section 415(3).

These Penal Code sections demonstrate that the state has already considered, and restricted, behaviors that might be declared a nuisance as it is defined in both the Civil Code and the Penal Code. The City has also adopted ordinances under its police power to support and strengthen existing state law. For example, the City prohibits disorderly or offensive conduct in public places, SDMC § 56.27; loud noises or disturbances as threats, SDMC § 56.50; and urinating or defecating in public, SDMC § 56.55. Additionally, the repeal of SDMC sections 56.25 and 52.26 was predicated on the finding that the state had preempted the field with respect to public intoxication, and had also restricted intoxication in some private areas as well.

The extensive legislation that already prohibits a wide range of offensive behavior, and the state preemption regarding public intoxication, may make it difficult to articulate a harm to the public, created by the consumption of alcoholic beverages on private property in public view, that is not already addressed. Absent such a finding, a restriction on the owner's use of his or her private property would not withstand judicial scrutiny. Courts have said "[a] private nuisance is the unreasonable, unwarranted or unlawful use by an individual of his own property so as to interfere with the rights of others." *Wolford v. Thomas,* 190 Cal. App. 3d 347, 358 (1987). Reasonableness in the context of nuisance law is determined by balancing the gravity of the harm against the utility of the conduct. Any restriction imposed by ordinance cannot "arbitrarily restrict an owner in the use of his property" *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928). If the City can determine that the harm caused by the consumption of alcoholic

beverages on private property in public view outweighs the owner's right to the use and enjoyment of his or her property, the restriction may be imposed.

CONCLUSION

The rights of a property owner to use and enjoy his or her property as he or she sees fit is carefully protected by constitutional due process rights. Restrictions on an owner's use of his or her property may be imposed only when necessary to protect the public from harm. Because of these protections, the City may adopt an ordinance banning consumption of alcohol on private property in public view only if certain conditions are met. The City must first ascertain and articulate the nature of the harm to be prevented. Having done that, the City must show that the proposed action restricting an owner's use and enjoyment of his or her own property is a reasonable method to abate the harm.

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